IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952.

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No. 174

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J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

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**Appeal from the United States District Court for the District of Columbia**

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## PETITION FOR REHEARING

On October 13, 1952, this Court entered a *per curiam* order vacating the judgment below and remanding the case to the district court with directions to dismiss the complaint upon the ground that the case is moot. Appellees respectfully petition the Court to reconsider that decision.[1]

[1] Under Rule 34 of the Rules of this Court, the mandate in this case will issue on November 8, 1952. We do not expect the Court will rule on this petition until November 10, 1952. We therefore respectfully move the Court to stay its mandate herein until it has ruled on this Petition for Rehearing.

We do not know the specific reasons which motivated the Court to reach this result. The opinion states no reasons except to cite *Snyder* v. *Buck*, 340 U.S. 15. Appellants' motion to vacate, on the other hand, appears to be based on the contention that the district court erred in entering the judgment *nunc pro tunc* against Mr. McGrath after his resignation. We can only conclude, therefore, that the decision is based upon one of those two grounds.

We contend: (1) That *Snyder* v. *Buck* has no application here because that decision rests entirely upon the fact that neither side had filed a timely motion to substitute, whereas here both sides have filed timely substitution motions. (2) That the order of this Court cannot properly be based on the alleged error of the court below in entering the judgment against Mr. McGrath because, even if that was error, it could not render the case moot or deprive us of our statutory right to move to substitute within six months. (3) That no matter what the rationale of this Court's decision, it is erroneous for the fundamental reason that it overlooks the fact that timely substitution motions have already been filed, and further denies the right to substitute when the time for substitution has not yet expired. We discuss these points in more detail below.

**The Circumstances Here are Fundamentally Different From Those in Snyder v. Buck in That Here Timely Motions to Substitute Have Been Filed and the Time for Substitution Has Not Even Yet Expired.**

The *Snyder* case involved a mandamus action to compel the Paymaster General of the Navy to pay a widow's allowance. The district court rendered judgment for the plaintiff; shortly thereafter the defendant retired and was succeeded in office; after such retirement notice of appeal to the Court of Appeals was filed in the name of the retired officer. Neither party filed a motion to substitute within the six-month period. This Court affirmed a ruling of the Court of Appeals vacating the judgment below and direct-

ing dismissal of the complaint. It held that Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941) made survival of the action dependent on a timely substitution, and therefore where there was a failure to move for substitution within the statutory period the action abated and the complaint must be dismissed, requiring the plaintiff to start over.[2] The Court pointed out that the retiring government officer had no right to obtain review, but held that even though the appeal was faulty the Court was required to dismiss the complaint because passage of the six-month period made it impossible to substitute the successor. In that connection it distinguished *Davis* v. *Preston*, 280 U.S. 406, where a similarly faulty appeal had been taken but there remained time in which to substitute the successor in the court below. The Court said (340 U.S. at p. 21):

> Therefore, on remand of the cause in the *Davis* case the successor Federal Agent could be substituted and the judgment enforced against him. On remand of the present cause there would be no way of substituting the successor, as the suit had abated in the District Court. Vacating the judgment of the District Court was therefore the proper procedure.

Thus, two points clearly emerge from the *Snyder* opinion. First, the judgment was vacated and the complaint dismissed there *only* because neither side had filed a timely motion to substitute. Second, since the appeal was faulty, the Court would have dismissed the appeal rather than the complaint if there had remained time to substitute below. In the instant case the circumstances are precisely the opposite. Here both sides have filed timely motions to

[2] The court distinguished the situation under the earlier Act of February 8, 1899 (30 Stat. 822), which had provided that in such a case the action should not abate and had fixed a period within which substitution could be made. The Court said that under that statute passage of the period for substitution merely resulted in the proceeding being "at an end" so that the proper procedure was to dismiss the appeal and leave undisturbed the judgment below.

substitute. Moreover, there remains time in which to file such a motion in the district court.

Applying that decision to the facts here, the situation is as follows. Under the *Snyder* case (as well as the *Davis* case) Mr. McGrath had no standing to seek review. The reason is that he no longer is responsible for enforcement of the Lobbying Act, all such responsibility and with it the right to take this appeal having passed to his successor. Appellants recognized this problem and therefore moved to substitute Mr. McCranery. We did not contest that motion. Unless the *Davis* and *Snyder* cases are to be overruled in this respect, appellants' motion to substitute Mr. McGranery must be granted to give them any standing in this Court. This would seem to be true with respect to the alleged error in entering the judgment against Mr. McGrath the same as all other alleged errors, for it is nothing more than one of several errors assigned by appellants to be heard on the appeal, and Mr. McGrath's interest in that alleged error is no different from his interest in any other. If that motion is granted, then the case cannot of course be moot. The order of the Court does not indicate any ruling on appellants' motion to substitute, and we must assume therefore that it decided the case on Mr. McGrath's appeal. Such action is squarely inconsistent with the principle established by the *Davis* and *Snyder* cases.

Out of an abundance of caution, however, we filed on October 2, 1952, our own motion to substitute Mr. McGranery, requesting that it be considered only if the Court did not grant appellants' motion. We attached this condition because we felt that under the decided cases it was the obligation of appellants to substitute Mr. McGranery if their appeal was to be heard, and we could see no reason for undertaking an obligation which did not rest upon us. We made the motion, however, in order to protect ourselves in all eventualities. That motion is timely and, if Mr. McGranery is not to be substituted on appellants' motion, we believe we have a right to be be heard on our motion. So

far as we can tell from the order of the Court, our motion has not been ruled upon. It appears, therefore, that we have been denied a hearing on our timely motion and thereby have been deprived of our statutory right to substitute.[3]

In addition, we are filing herewith a motion to substitute under Rule 25(d) of the Federal Rules of Civil Procedure. In our earlier motion we requested that it be considered only if this Court's Rule 19(4) is deemed still effective, and said that we would file a subsequent motion under Rule 25(d). We think it clear that since the statute referred to in Rule 19(4) has been expressly repealed, that Rule no longer has any effect and Rule 25(d) now governs substitution in this Court. This Court has strongly indicated as much. See *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119; *Snyder* v. *Buck*, 340 U.S. 15, 17, fn. 2. Under Rule 25(d) we have until November 27, 1952 in which to move to substitute. Hence this motion is timely. Moreover, it alleges facts which are incontrovertible and subject to judicial notice, and which are clearly sufficient to warrant substitution under Rule 25(d). Therefore, if substitution is not to be granted on either appellants' motion or our earlier motion, we think it clearly must be granted on the motion filed herewith.

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[3] In their memorandum in opposition, appellants contended that our motion should be denied because it was not accompanied by proof of the facts alleged therein. It is clear, however, that a simple allegation of the ultimate facts is enough. Stern and Gressman, *Supreme Court Practice* (1950), p. 344. And where such an allegation is not denied, as it was not here, substitution should be granted. *Allen* v. *Regents*, 304 U. S. 439, 445. Certainly we should not be required to submit our proof unless and until the allegation is denied by appellants. We have stated in our reply brief in support of the motion that we are prepared to make such proof if that should be necessary. Under the circumstances, it is inconceivable to us that the Court would deny our motion on this ground. Moreover, the order of the Court in no way indicates that this motion has been denied. Consequently we have on file a timely motion to substitute which, in our opinion, must be considered by the Court, and if it is granted the case cannot become moot.

We submit, therefore, that the situation here is just the reverse of that in the *Snyder* case. There no one had filed a motion to substitute, the six-month period had expired, and consequently the case had abated. The Court clearly indicated that under any other circumstances it would have permitted the plaintiff to preserve the judgment below. In this case, timely motions have already been filed to cover all contingencies, and the six-month period has not yet expired. Consequently the case cannot possibly have abated. Nor can the case become moot unless those motions are denied. Since the motions have not yet been passed upon, the case obviously is not now moot.

**If the Court's Decision is Grounded on the Alleged Error of the District Court in Entering the Judgment Against Mr. McGrath, the Dismissal of the Complaint as Moot is Erroneous for the Reason That Such an Error Would Not Render the Case Moot or Provide the Basis for Denying us the Right to Substitute, and for the Further Reason that the Action of the District Court in this Respect Was Proper.**[4]

Assuming the district court erred in entering the judgment against Mr. McGrath after his resignation (which

[4] This Court's citation of *Snyder* v. *Buck* would indicate that its ruling is not based on the alleged error in entering the judgment *nunc pro tunc*. The *Snyder* case does not hold that it is improper to enter a judgment *nunc pro tunc* against an officer who has resigned; the district court judgment there was not entered *nunc pro tunc* but was entered before the officer's resignation. It does not hold that such entry, assuming it to be error, renders the case moot and requires dismissal of the complaint; the complaint there was dismissed solely for the reason that the case had abated for failure to file a timely motion to substitute. It does not hold that such entry, assuming it to be error, wipes out appellees' statutory right to substitute the successor upon a timely motion; there was no timely motion in that case. Thus the *Snyder* case deals with none of the questions which are pertinent if this alleged procedural error is the basis of this Court's ruling. We discuss the point here, however, because it appears to have been the ground asserted in appellants' motion to vacate, which this Court granted.

we deny), such an error is manifestly not a proper ground for declaring the case moot, or for dismissing the complaint and thereby depriving appellees of their statutory right to move within six months to substitute Mr. McGranery.

The case obviously did not become moot for all purposes upon Mr. McGrath's resignation. There still remained the six-month period for substitution. The very purpose of the substitution Rule is to prevent the automatic abatement of cases and the requirement that plaintiffs start over in such instances. To hold that the case became moot upon Mr. McGrath's resignation and that the complaint should therefore be dismissed would be a complete subversion of that Rule. Under the Rule the case does not abate and the complaint cannot be dismissed as moot unless no motion is filed within the six-month period, or unless such a motion is denied on the ground that substitution is not warranted.

It may be suggested that the case became moot as to Mr. McGrath upon his resignation, although there remained the right to substitute Mr. McGranery. But certainly that can provide no basis for dismissing the complaint in its entirety. The very purpose of the Rule is to keep the case pending for six months to permit the parties to substitute if the facts warrant. To dismiss the complaint because the case became moot as to the predecessor without waiting for expiration of the six-month period in which to move to substitute the successor is nothing less than repeal of the substitution Rule.

Consequently appellees have a statutory right to move within six months to substitute Mr. McGranery unless something has happened in this case to deprive them of that right. The only thing that has occurred here is the entry of the judgment *nunc pro tunc* against Mr. McGrath. It may be the theory of the Court that the case became moot as to Mr. McGrath when he resigned, and that therefore it was error to enter the judgment against him. But even assuming that procedure to have been erroneous, it cannot possibly have the effect of abating the case, of ren-

dering it moot for all purposes so as to require dismissal of the complaint, or of depriving appellees of their right to move within six months to substitute Mr. McGranery.

A case abates only if no motion to substitute is filed within the six-month period. Entry of the judgment against Mr. McGrath cannot shorten that period and cause the case to abate at an earlier date.

A case such as this becomes moot only if it has abated for failure to file a timely motion, or if the requirements of the Rule on substitution cannot be met so that such a timely motion must be denied. Under the Rule, substitution is permitted if it can be shown that the successor adopts or continues the action of his predecessor in enforcing a law averred to be unconstitutional. The alleged procedural error can have nothing to do with the existence or non-existence of such facts. Even though it be assumed that the case became moot as to Mr. McGrath, it is not moot as to Mr. McGranery if the necessary facts can be proved. And the alleged procedural error cannot make the case moot as to Mr. McGranery or deprive appellees of their right to prove those facts.

Nor can this alleged error have one effect of denying to appellees the right to substitute granted by the Rule. That of course would be the result of the order directing dismissal of the complaint. Appellees have filed timely motions under both Rule 19(4) and Rule 25(d). Those motions have not been heard. Moreover, the time to file such a motion under Rule 25(d) has not even yet expired. Yet the order of the Court would require plaintiffs to start their case over without ever having the opportunity to take advantage of the substitution Rule. Certainly there is nothing in the alleged procedural error which requires this result. There is nothing in that error which demands or permits nullification of that statutory right.

The alleged error may be readily corrected without any such result. At the time the judgment was entered below, the court had the alternative of requiring substitution

before entry, or of entering the judgment *nunc pro tunc* against Mr. McGrath. The court chose the latter procedure. If that was error, it may be fully remedied by requiring substitution now. Thus if this Court should hear appellees' motions and rule that the requirements have been satisfied, the error in the *nunc pro tunc* entry has been entirely eliminated. If the Court should prefer to have the matter heard by the district court, the judgment may be vacated and the case remanded to that court for such consideration. But in no event should the complaint be ordered dismissed. Appellees are entitled to the six-month period within which to file their motion and, after filing, are entitled to have their motion heard. This Court's direction that the complaint be dismissed improperly deprives appellees of these rights, and is under no circumstances necessary to bring about correction of the alleged error.

Moreover, we wish to set forth here at least in summary fashion our reasons for believing that the *nunc pro tunc* procedure was correct. That question has never been briefed in this Court. Appellants have contented themselves with stating simply that the *nunc pro tunc* procedure was not appropriate here. Since that was one of the errors assigned on their appeal and since they did not argue the point in detail in the motion papers, we concluded that we should not do so. Now that it appears, however, that the Court may have ruled as it did on the theory this procedure was erroneous, we desire to summarize our reasons for thinking such procedure to be correct.

In this connection certain circumstances should be made clear. In its written opinion filed on March 17, 1952, the district court reached all of its ultimate conclusions on both the facts and the law, and at the end thereof concluded: "A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted." (See Opinion in Statement as to Jurisdiction, p. 25.)

The uniform practice in this district court calls for the prevailing party to prepare for the court's assistance find-

ings of fact, conclusions of law, and judgment; to show these papers to opposing counsel; and then to submit them to the court. Appellees' counsel sought to show these papers to counsel for appellants on March 31, 1952, but he was out of town and not expected to return until April 2. After consulting with the court, it was decided that the papers should be held until his return. On April 2, counsel for appellees learned that counsel for appellants would not return until on or about April 4. After again consulting with the court, counsel for appellees on April 2 delivered copies of the papers to the secretary of counsel for appellants and on the same date submitted the papers to the court. Five days later, on April 7, Mr. McGrath resigned. It was not until April 10, 1952, that counsel for appellants informed the court of his position with respect to the papers prepared by appellees.[5]

From this it is clear that the district court reached its final decision on both the facts and the law on March 17, 1952, and the only steps then remaining were the formal ones of entering the findings, conclusions and judgment. Those papers could as well have been entered by the court at the time it rendered its opinion, and they were not so entered only because of the practice in this district mentioned above. It is also clear that these papers could have been filed prior to Mr. McGrath's resignation but for the fact that counsel for appellants was unavailable and did not inform the court of his position until after the resignation of Mr. McGrath.

The decisions of this Court make it clear that under such circumstances it is entirely proper to enter the judgment *nunc pro tunc* as of the date of the opinion. For example, this Court has frequently held that judgment may be entered *nunc pro tunc* as of the date of *argument* where one

[5] These facts are recited in the memorandum which appears in the transcript of record in this case entitled: Plaintiffs' Memorandum in Opposition to Defendant's Memorandum on the Authority of the Court to enter an Order of Injunction against Defendant McGrath Nunc Pro Tunc as of the Date of the Court's Opinion.

of the parties has died between that date and the date of judgment. *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 359; *Bell* v. *Bell*, 181 U.S. 175, 178-179; *Mitchell* v. *Overman*, 103 U.S. 62, 65. In the last-named case the Court said (at p. 65):

> A *nunc pro tunc* order should be granted or refused, as justice may require in view of the circumstances of the particular case. These principles control the present case. Stutzman was alive when it was argued and submitted. He was entitled at that time, or at the term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the act of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

The *Quon Quon Poy* case is closely in point. It involved a petition for a writ of habeas corpus directed to the Commissioner of Immigration. The district court had discharged the writ and remanded the petitioner to the custody of the Commissioner. The Commissioner died after the date on which the case was argued on appeal in the Supreme Court, and some time before the decision. The Supreme Court affirmed the judgment of the lower court and directed entry of the judgment *nunc pro tunc* as of the date of the argument. It is true that there the judgment was in favor of the government officer, whereas here the judgment below is for appellees. But if it is appropriate to enter a *nunc pro tunc* judgment in such a case where the government prevails, it must be equally appropriate to enter such a judgment in favor of the private party.[6]

[6] It is also to be noted that the judgment here is not "coercive" and does not require execution, as did the judgment in *Snyder* v. *Buck*, for example. The judgment here is prohibitory and requires no further action by the Court to make it effective. At the time the judgment was entered, neither the Court nor appellees knew whether appellants would appeal, and it was not the obligation of appellees to prepare the case for appeal. The only interest of the

**No Matter What the Basis of the Decision, It Is Fundamentally Erroneous in That It Overlooks the Fact That Timely Substitution Motions Have Been Filed, and Further in That It Wipes Out the Statutory Right of Substitution.**

To summarize the situation here, there are two rules on substitution—Rule 19(4) of the Rules of this Court and Rule 25(d) of the Federal Rules. Under Rule 19(4) the time for filing a motion to substitute expired October 7, 1952. Under Rule 25(d), the time expires November 27, 1952.

We think Rule 25(d) governs. But whichever rule applies, both sides have filed timely motions. The case cannot abate in such circumstances. Nor can it become moot, so that the complaint should be dismissed, unless the motions are denied. The alleged error in entering the judgment against Mr. McGrath cannot abate the case, render it moot, or elminate the right of substitution. If it was error so to enter the judgment, that is not a ground for directing dis-

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Court and of appellees was to secure the entry of a final judgment carrying out the decision of the Court. If there was to be no appeal, a judgment *nunc pro tunc* against Mr. McGrath would have been as effective as a judgment entered before his resignation. Certainly if the judgment had been entered before he left office and no appeal had been taken, no one would expect appellees to secure the substitution of every succeeding Attorney General to take office in the future. The only occasion for substitution in such a case would be if the government desired to appeal, in which event it would be their obligation to substitute the new Attorney General. The same should be true in this case. If there were to be no appeal, the *nunc pro tunc* judgment against Mr. McGrath would give appellees as effective relief against successors as if the judgment had been entered prior to his resignation. Consequently here, as in any other case, the only reason for substitution was to enable the new Attorney General to take an appeal. That was not appellees' obligation, and they were entitled to proceed as if the judgment in the district court would become final. For this additional reason, it was proper for the court to enter the judgment *nunc pro tunc* against Mr. McGrath, and for the same reason it would seem to be proper to require the appellants to substitute Mr. McGranery if their appeal is to be heard.

missal of the complaint and requiring us to start over below. Such an error can be adequately corrected by permitting us to substitute either here or below. Such substitution wipes out the error and puts the parties in precisely the position they would have been had the judgment not been entered *nunc pro tunc*. Not only is such dismissal of the complaint not necessary to correct the error, but it is a clear denial of appellees' statutory rights. Appellees are entitled to six months in which to move to substitute. They have filed timely motions under both rules and to cover all contingencies. The alleged error of the district court cannot cut short that period, or deprive appellees of their statutory right to substitution upon the proper showing.

## CONCLUSION

In conclusion appellees submit: (1) Under the *Davis* and *Snyder* cases appellants are not entitled to review except upon the substitution of Mr. McGranery and consequently their substitution motion must be granted before the Court can consider the case. When that motion is granted the action cannot abate or become moot. Thus the Court should grant that motion and proceed to hear the case on the merits. (2) If the Court disagrees with us in that respect, it should itself rule upon appellees' motions to substitute which have been filed under Rule 19(4) and Rule 25(d). We believe that there are sufficient incontrovertible facts of which this Court may take judicial notice to warrant the granting of these motions. If appellants should deny any of the facts alleged, however, and the Court should desire additional proof, appellees should be given the opportunity to submit such proof by affidavit or otherwise. (3) Finally, if the Court disagrees with both of the contentions stated above, it should in any event strike that part of its order which directs dismissal of the complaint and

remand the case to the district court for consideration of appellees' motion filed herewith under Rule 25(d).

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
*Counsel for Appellees.*

October 1952.

**Certificate**

I certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

KENNETH L. KIMBLE